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Supreme Court, U.S.
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Clerk.

In United States Supreme Court,

October Term, 1902.

No. 121.

THE HOME LIFE INSURANCE COMPANY, of New York, Plaintiff in Error,

vs.

A. A. FISHER, as Executor of the last will and testament of Alexander Sutter MacLean, Deceased, Defendant in Error.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of Defendant in Error.

W. H. Hart, Printer, Jacksonville, Fla.

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vs.

A. A. FISHER, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALEXANDER SUTER MACLEAN, DEFENDANT IN ERROR.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of Defendant in Error.

STATEMENT.

Defendant in Error, as Executor of the last will and testament of Alexander Suter McLean, sued the Plaintiff in Error upon a policy of insurance upon the life of his testator.

Defendant in Error recovered a verdict and judgment, for the reversal of which Plaintiff in Error sues out its writ of error.

The policy sued on, together with the application, options and conditions, are made parts of the declaration and are set out in the printed transcript at pages 4. *et seq.*; and declaration to the medical examiner and his report are made part of the amendment to the declaration in the case, and are set out at pages 11, *et seq.*

The Insurance Company filed a great number of pleas, but "withdrawing all former pleas," (p. 17) pleaded (pp. 17 to 22) sixteen pleas, numbered from 1 to 16, and afterwards (pp. 25 and 26) filed pleas numbered 17, 18, 19 and 20,

and also further pleas (p. 33,) 21 and 22, and (pp. 41 and 42,) plea 26, and (p. 45,) plea 27.

Demurrers were sustained to pleas 1 to 15, inclusive, and 23 to 25 inclusive.

Pleas 16, 18, 19, 20 and 22 were withdrawn, (p. 43.)

The case went to trial on pleas 17, 21, 26 and 27.

Plea 27 was filed pending the trial, when defendant in error withdrew his amendment to the declaration (p. 43,) whereby certain conditions, which were involved in demurrers which had been sustained to pleas, were removed from the pleadings and brought in by way of evidence at the trial.

The errors assigned and now insisted upon involve certain of the pleas overruled, on demurrer, while the amendment of the declaration was in as a part of the pleadings, and certain instructions which the plaintiff in error requested, but were refused by the court, and certain instructions which, upon the request of defendant in error, were given to the jury by the court.

Plaintiff in Error has informed us, by its attorney, that it will only insist on assignments upon certain of the errors assigned, to-wit:

Assignment No. 1.

That the court erred in sustaining the demurrer to the plea numbered 1, filed January 28, 1901.

Assignment No. 2.

That the court erred in sustaining the demurrer to the plea numbered 3, filed January 28, 1901.

Assignment No. 3.

That the court erred in sustaining the demurrer to the plea numbered 23, filed March 15, 1901.

Assignment No. 4.

That the court erred in sustaining the demurrer to the plea numbered 4, filed January 28, 1901.

Assignment No. 5.

That the court erred in sustaining the demurrer to the plea numbered 6, filed January 28, 1901.

Assignment No. 6.

That the court erred in sustaining the demurrer to the plea numbered 7, filed January 28, 1901.

Assignment No. 7.

That the court erred in sustaining the demurrer to the plea numbered 8, filed January 28, 1901.

Assignment No. 8.

That the court erred in sustaining the demurrer to the plea numbered 9, filed January 28, 1901.

Assignment No. 9.

That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorney's fees in this case, as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions.

Assignment No. 13.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered 9, as set forth in the fifth exception of the bill of exceptions, to-wit: "9. Any habit of drinking spirits by McLean was material if it was to such an extent that according to the course of practice of life insurance companies generally it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

Assignment No. 14.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 11, as set forth in the 6th exception of the bill of exceptions, to-wit: "11. You will find from the evidence that the defendant was induced by the representations of A. S. McLean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon."

Assignment No. 15.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 16, as set forth in the 7th exception of the bill of exceptions, to-wit: "16. The plaintiff has not proved his replication, to-wit: That the defendant informed McLean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner; and informed him that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said McLean; and that the said McLean understood and had reason to understand that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing, McLean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts."

Assignment No. 18.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff numbered 11, as set forth in the 10th exception of the bill of exceptions, to-wit: "11. The court instructs you that in cases where the question of temperance or intemperance is involved there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury, and in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

Assignment No. 22.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 18, as set forth in the 14th exception of the bill of exceptions, to-wit: "18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in con-

nection therewith, it is fair, and you have right to infer that the company waived information upon that point."

Assignment No. 23.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 28, as set forth in the 15th exception of the bill of exceptions, to-wit: "28. If you find that the habits of Alexander Suter McLean, the assured, in the usual, ordinary and every day routine of his life were temperate, then the representations made by him in his application to the medical examiner were not untrue within the meaning of the conditions upon which the policy sued upon was issued."

In discussing the assignments based on rulings on the pleas, we will endeavor to follow, for the convenience of the court, the grouping of pleadings as made by attorneys for plaintiff in error, taking these groups up in order. Before doing so, we present below a statement of the facts as found in the declaration and amendment and exhibits "A" and "B," which the legal effect of the pleas demurred to was to admit, and were hence regarded by the court as admissions of record to be used in reaching a conclusion upon the demurrers to the pleas. Upon such demurrers, and each of them, the court has before it as follows:

(1.) The general allegations of the declaration as to the making of the policy sued on, the death of the insured and appointment of defendant in error as executor of his last will and testament, (p. 3.)

(2.) The policy of insurance (p. 4,) reciting that "the options, benefits and conditions printed or written by the said company upon the back of this policy are a part of this contract as fully as if they were recited at length over the signatures hereto affixed."

(3.) The following questions and answers in the application, (p. 8:)

"9a. Do you drink wine, spirits or malt liquors?" a. Yes."

"9b. If so, which of these and to what extent?" b. Moderately."

"9c. Have you ever used them freely or to excess? c. No."

And in the same application (p. 9,) the following:

"I warrant, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, that all of the foregoing statements and answers are true, full and complete, whether written by my own hand or not, and are offered to the company, together with those contained in the declaration to the Home Life Insurance Company's Medical Examiner, as a consideration for and as the basis of the contract with said company under any policy issued under this application."

(4.) Declaration by deceased to the company's medical examiner, wherein (pp. 13 and 14,) occurred the following:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

"14a. No habit of drinking liquors."

"b. If so, which of these and to what extent daily?"

"b. ..... (not answered.)

"Note. State the daily amount General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

"c. Have you ever used them freely or to excess?"

"c. No."

(5.) Medical Examiner's report, wherein (pp. 15 and 16) are the following:

"3a. Has he the appearance of a person addicted to the use of stimulants?

"a. No."

"15a. Have you reviewed the answers as set down on the two sides of this sheet to make sure that the same are correct, and that every question has some answer? Please see that all erasures and corrections are properly initialed."

"a. Yes."

"b. Have you examined the accompanying application and verified the statements therein recorded? Please see that the signatures to the application and declarations are alike, and that the date of the application is inserted in the place provided for it on the other side of this sheet.

"b. Yes."

And the additional remark of the medical examiner on

page 17. "His condition is exceptionally good, as you will see from the foregoing report."

(6.) Approval of the medical examiner's report by the decision of the medical director of the company (p. 17,) thus: "Approved August 31, 1899, F. W. Chapin, Medical Director."

This court will find, upon examining the assignments now insisted upon, that in so far as the pleas to which demurrers were sustained are concerned:

(1.) They are not good in law.

(2.) The same defence was set up in other pleas afterwards filed, to which demurrers were not interposed.

(3.) The same defense was set up in subsequent pleas, upon which issues were made or tendered, and which were voluntarily withdrawn by the company before trial, and,

(4.) Instructions were given to the jury that fully covered, in a manner favorable to the company, the substance of the defenses set up in the overruled pleas.

The court will find, in reference to the instructions asked for by the company and refused, that they were

(1.) Properly refused.

(2.) The substance of them was given in other instructions.

And, as to instructions given at the request of defendant in error, the court will find,

(1.) That they were properly given.

(2.) That other instructions given made the giving of them harmless error, if erroneous.

Plaintiff in error places in its first group pleas 1, 2, 3 and 23, which allege that the testator, McLean, in his application for the policy in suit, made certain statements which were warranties.

1. There is no warranty contained *in this policy*. No words of warranty occur in it, but only in the *application* for insurance.

In Moulor vs. Am. Life Ins. Co., 111 U. S., 335, this court stated the law to be such as to preclude the idea of the policy in the present case being taken as *warranting* the answers made to questions in the application for insurance and declaration made by the assured to the medical examiner.

In that case there was in the application, among other things, the following:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions."

And the policy recited:

"It is hereby declared and agreed that if the representations and answers made to this company on the application for this policy upon the full faith of which it is issued shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in every such case, the policy shall be null and void."

This court said in its opinion, page 342:

"We have seen that the *application* contains a stipulation that it shall form a part of the contract of insurance; also that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, or what was the intention of the parties. Taken together it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth in every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact literal fulfillment of all the declarations embodied in the application. It is true that the word 'warranty' is in the application, and although the contract might be so framed as to impose upon the insured the obligation of a strict warranty without introducing into it that particular word, yet it is a fact not without some significance that the word was not carried forward into the policy, the terms of which control when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as *representations*. Thus we have one part of a contract apparently stipulating for a warranty, while another part describes the

statements of the assured as representations. The doubt as to the intention of the parties, must, according to settled doctrines of the law of insurance, recognized in all the adjudged cases, be solved against the party whose language it becomes necessary to interpret. The construction must therefore prevail which protects the insured against obligations arising from a strict warranty."

In the present case the policy recites, (p. 4,) that it is made "in consideration of the *statements and agreements* made in the application for this policy."

And besides that, it is only necessary to look at portions of the application for insurance, (pp. 8 and 9,) portions of the declaration made to the medical examiner, (pp. 13 and 14,) and the medical examiner's report, (pp. 15 to 17,) to ascertain that it was not the intention either of the insured or of the insurer that the deceased intended to warrant the absolute truth of the *statements* made by him. In the application accompanying the policy this occurs:

9a. Do you drink wine, spirits or malt liquors? a. Yes.

9b. If so, how much of them, and to what extent? b. *Moderately.*

It is too plain for argument that the intention of the assured in this was to admit that he did drink wine, spirits or malt liquors, and to such an extent as *in his opinion* made him a *moderate drinker.*

In his declaration to the medical examiner of the company, the following occurs:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

"a. No habit of drinking liquors.

"14b. If so, which of them and to what extent daily?"

"b. .... (not answered.)

"Note. State the daily amount. General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

"14c. Have you ever used them freely or to excess?"

"c. No."

From this it is very clear that the deceased intended that his statements should be taken and construed in connection with what he had already stated in his application. He had there said that he drank *moderately.* He here says that he has *no habit* of drinking liquors. By these two statements before the insurance company at the same time

it must have been intended, and the company ought to have understood, that the applicant meant that he was a moderate drinker of liquors, but that in his opinion that drinking did not constitute a habit. Whether it constituted a habit or not in the estimation of the company would have been ascertained by requiring the applicant to answer the question 14b, but this appears not to have been insisted upon. It was not answered, and that, notwithstanding the question was immediately followed by the note informing the applicant that he must state the daily amount which he drank, and that general terms descriptive of the extent of his drinking would not be accepted and would necessitate *correspondence*.

Having *that* in mind the applicant, when pressed with the further question, 14c. Have you ever used them freely or to excess? answered "No," reasonably understanding that his own estimate of his habits was all that the company would require of him, and that if it desired to obtain further information it would do so by means of "correspondence," and not in *reliance upon* any statement, representation or warranty of his. That such was the purpose of the insurance company is perfectly plain from what afterwards appears in the medical examiner's report, in which he says that the applicant did not have the appearance of one addicted to stimulants, and that there was nothing about him to suggest that he had ever led other than a sober and temperate life, followed by the remark made by the medical examiner that his "condition is exceptionally good, as you will see from the foregoing report."

In the case of Phœnix Ins. Co. vs. Raddin, 120 U. S., 190, this court said:

"When upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want of imperfection in the answer and render the omission to answer more fully immaterial."

"The four interrogatories grouped together in one question and all relating to the same subject, would naturally be understood as all tending to one object."

"The legal effect of issuing a policy upon the answer as it stood, was to waive their right to require further answers as to the particulars mentioned, and to determine that it was immaterial for the purpose of their contract."

"The insurers, thus having conclusively elected to treat the omission as immaterial, could not afterwards make it material by proving that it was intentional."

In Mut. Res. Fund Assn., 47 S. W., 850, the court said:

"An insurance company cannot claim that the policy is void because the insured suppressed facts by failing to make an answer to certain questions in his application when the application was received by the insurer without any objection"

In Liberty Hall Assn. vs. Housatonic Mut. Fire Ins. Co., 7 Gray, 261, the court said:

"A waiver of the right to any information upon matters inquired of in one of the interrogatories to an applicant for insurance, may be inferred from the issuing of a policy upon an application in which this interrogatory is unanswered, although the applicant has answered in the negative another interrogatory, whether 'there are any other circumstances affecting the risk.'"

And the general rule of law is, "that conditions and provisos must be strictly construed against the insurers, because they have for their object to limit the scope and defeat the purpose of the principal contract, and as the insurer prepares the contract and furnishes the language used, any ambiguity in the contract must be taken most strongly against him."

Dilliber vs. Home Life Ins. Co., 69 N. Y., 256;
1 May on Ins. Sec. 176.

What we have here said meets any contention that the plea is good, even though the court should find that there is no technical warranty shown, upon the ground that the representations made were untrue in respect of *matters material to the risk*. A contention some what like that was made in Moulor vs. Am. Life Ins. Co, *supra*, 343, in reference to which this court said:

"But it is contended that if the answers of the assured are to be deemed representations only, the policy was nevertheless forfeited if those representations were untrue in respect of any matters material to the risk."

The court then proceeded to dispose of the contention, as we have just undertaken to do.

But plaintiff in error cannot complain that demurrers to these pleas were sustained to his prejudice, because the court gave to the plaintiff in error the full benefit of all that

he could have obtained under the said pleas by the following instruction found in the 3rd exception, p. 47, to-wit:

"If you find either one to be true, that before McLean made application he drank liquor either freely or to excess, or at the time that he made the application he had a habit of drinking liquor, you will find in this case for the defendant."

And, again, "the defendant, under the pleadings, is required to prove either that A. S. McLean had before the making of the application, to-wit: August 22, 1899, a habit of drinking freely, or a habit of drinking spirits to excess, or had at the time of his statement to the medical examiner, to-wit: August 24, 1899, a habit of drinking spirits But it is not necessary that the defendant should prove the existence of more than one of these habits."

And, again, "it is not necessary, in order that you may find for the defendant, that you should find that McLean ever drank spirits freely or to excess. It is only necessary as to the extent of the drinking that you should find that he had at the time of his application a habit of drinking spirits."

And in the same direction the court gave, at the request of the plaintiff in error, instructions 12, 13, 14, 15, 18, 19 and 20, (pp. 55 and 56.)

Plaintiff in error places in its second group pleas 4 and 6, which allege that the testator, McLean, in said application made certain statements which were representations which were material to the risk assumed by plaintiff in error in issuing the policy, and which were untrue.

And in its third group it places the 7th, 8th and 9th pleas, which were like the 4th and 6th except that they allege the manner in which the repsesentation were material.

1. The authorities cited above and argument there made apply fully to the pleas embraced in these two groups, and need not be repeated.

2. Until the beginning of the trial of the case plaintiff in error had in, with issues made upon them, plea numbered 16, (p. 22,) alleging that McLean had a habit of drinking spirits to excess, that said habit was material to the risk to be assumed by the defendant, because the existence of such habit would tend to injure the health and shorten the life of the said McLean, and that the said Mc-

Lean knew of the existence of the said habit, and believing the same to be material to the said risk he fraudulently withheld the knowledge of such fact from the defendant;

and plea numbered 18, alleging "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of, the making of the said answer he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy, and that at the time of the making of the said answer the said McLean knew of the existence of the said habit and believed the same to be material to the risk;"

and plea numbered 19, (p. 26,) alleging, "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of, making the said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life, that the existence of such habit tended to injure the health and shorten the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy;"

and plea numbered 20, (pp. 26 and 27,) alleging, "that the said answer to the said question 9c was not full and complete, because prior to, and at the time of making the said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life. That the knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or refuse to issue a policy of insurance on the said life. That the existence of such habit tended to injure the health and shorten

the life of the said Alexander S. McLean, and that the said McLean knew at the time of making said answer of the existence of the said habit, and believed the same to be material to the said risk, and that the said defendant was induced by the answer of the said McLean to issue the said policy;"

and plea numbered 22, (p. 33,) alleging, "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of making the said answer he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue a policy of insurance upon the said life. That the knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life. That the existence of such habit tended to injure the health and shorten the life of said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy"

Now, it is perfectly apparent by a comparison of the pleas which were overruled upon demurrer and included in the said groups 2 and 3, that if it be that, in law, those pleas or any of them constitute a defense, every allegation of them and every defense in them set up is contained in at least one of the pleas, 16, 18, 19, 20 and 22, upon which plaintiff in error had an opportunity to go before the jury, and which were in fact in, with issues made upon them, at the time when the trial of the case was commenced. Yet, with this opportunity to present such issues upon such pleas to the jury, plaintiff in error deliberately withdrew them. Under such circumstances it must be that plaintiff in error has abandoned the right to assign error on account of the court below sustaining demurrer to pleas 1 to 15 and 23 to 25.

3. But, in addition to the position just taken, the trial was proceeded with upon issues made upon pleas 17, 21 and 26.

Plea number 17, (pp. 25 and 26,) alleged, "that the said

answer to the said question 9c was not true, full and complete because prior to, and at the time of, making the said answer he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Plea number 21, (p. 33,) alleges, "that the said answer to the said question was not true, full and complete, because prior to, and at the time of, making said answer he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander Suter McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Plea number 26, (p. 41,) alleges, "that the said answer was not true, because the said A. S. McLean did have at the time of making the same a habit of drinking liquors, to-wit, spirits; and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said A. S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Upon all of these pleas issues were made and submitted to the jury, and it will be observed by a comparison of them with the pleas that were overruled upon demurrer, that upon them substantially the same issues could be made, and were made, for the jury, as could have been made upon those that were overruled.

4. Instructions given by the court substantially submitted to the jury in a way favorable to plaintiff in error all of the questions and contentions raised or intended to be raised by the overruled pleas.

See instructions 6 and 7, (pp. 47 and 48,) and instructions 12, 13, 14, 15, 18, 19 and 20 (pp. 55 and 56.)

It is a well settled rule in this court, as well as in every other court, that no judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the right of the party against whom the ruling was made.

Lancaster vs. Collins, 115 U. S. 222.

Defendant is not prejudiced by the sustaining of demurrer

to the plea or answer if he has other pleas or answer under which he could introduce any evidence that would have been admissible under that demurred to.

Pollock vs. Brush Elec. Assn 128 U. S. 446;
Hudmon vs. Cuyas, 57 Fed. 355.

Defendant is not injured by sustaining a demurrer to a cross bill where it appeared that the court treated the allegations thereof as before it, applied the evidence and held that they were not sustained.

Lloyd vs. Preston, 146 U. S. 630.

The sustaining of a demurrer to a valid plea is not reversible error when another plea is admitted which includes all the matter alleged in the first plea and lets in all the proofs sought to be introduced under the first plea.

Hudmon vs. Cuyas, 57 Fed. 355.

Where an answer has been stricken out but the defendant has been permitted to put in his evidence as if it remained, even if the order striking out the answer was erroneous, it was harmless.

County of Nemeha vs. Frank, 120 U. S. 41.

Striking out pleas to the declaration is not prejudicial where evidence competent under them would have been equally competent under other pleas.

Sup. Council Cath. K. of A. vs. Fidelity & Casualty Co. 63 Fed. 48.

The foregoing covers assignments of error numbered 1, 2, 3, 4, 5, 6, 7 and 8.

Assignment of Error No. 9.

"That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorneys' fees in this cause as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions."

This assignment covers the action of the Circuit Court, upon which the plaintiff in error relies as the basis of his right to prosecute his appeal directly to this court. Without that the case would not have come here. This court has already disposed finally of the question involved in this assignment in the case of Fid. Mut. Life Assn. vs. Mettler, 185 U. S. 308. We do not deem it necessary, or proper, to

argue the assignment. The statute relied on by defendant in error is this:

CHAPTER 4173—(59.)

AN ACT in Relation to the Liability of Life Insurance Companies and Fire Insurance Companies in the State of Florida.

Be it Enacted by the Legislature of the State of Florida:

SECTION 1. That upon the rendition of a judgment or decree by any of the courts of this State against any life or fire insurance company, in favor of the holder or holders of any policy of insurance written by such company, there shall be adjudged or decreed against such insurance company, and in favor of the holder or holders of such policy, a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had.

SEC. 2. That the amount to be recovered for fees and compensation for attorneys and solicitors against life or fire insurance companies, as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies.

SEC. 3. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SEC. 4. That immediately upon the approval of this Act the Treasurer of the State shall send a copy of this Act to each fire insurance company doing business in this State.

Approved June 2, 1893.

Assignment of Error No. 13.

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered 9, as set forth in the 5th exception of the bill of exceptions, to-wit: '9. A habit of drinking spirits by McLean was material if it was to such an extent that according to the course of practice of life insurance companies generally it would have led to the rejection of the risk if it had been made known to the defendant before the issuance of of the policy."

1. We do not think that the instruction prayed for

should have been given. There are all kinds, qualities and degrees of life insurance companies, and it might well be that what would be generally insisted upon by most of them would not be such as would be regarded as a reasonable demand by leading and first class companies. If the principle contended for has any support at all, it would only be to the extent that the demand should be such as would seem to be reasonable in the estimation of, and be consistently insisted upon, by insurance companies of leading position and character.

In order that the rule invoked by this instruction be given to the jury to guide it in its deliberations, it should be qualified so as to provide that the rule should be reasonable and fair. The instruction asked for and refused would make any habit of drinking spirits, even though it might involve the drinking of only one glass a day or every other day, without possibility of any injury to the health resulting, suffice to defeat the action, if the rule be as stated in the instruction.

2. Plaintiff in error was not injured by the refusal to give the instruction, because the court did give, as set out in the 5th exception, instruction 8, to-wit: "The pleadings admit that the said A. S. McLean made the representations charged in the pleas, to-wit: The representation that he had not before August 22, 1899, had a habit of drinking spirits freely, or a habit of drinking spirits to excess, and the defendant has proved that such representations were material to the risk to be assumed by the defendant, so that you will find that such representations were made, and that they were material to the risk."

Assignment of Error No. 14.

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 11, as set forth in the 6th exception of the bill of exceptions, to-wit: '11. You will find from the evidence that the defendant was induced by the representations of A. S. McLean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon.'"

1. The court properly denied this instruction because it had before it, as admitted, the statements made by the

assured in his application for insurance, his declaration to the medical examiner of the insurance company, the medical examiner's report, and the approval of the risk by the medical director of the company, all of which has been above fully set forth. The court evidently was of opinion that the manner in which the questions involved were answered, or the answers thereto waived, the apparent understanding between the assured and the company's agent as to the company having the right and intending to prosecute other inquiries in reference to the habits of the assured, was unwilling to compel the jury to find that the action of the insurance company was induced solely by the representations of McLean, and to compel the jury to find that the unqualified representation of McLean was that he never used spirits freely or to excess, and that he did not have any habit at all of drinking liquors. Had the court given the instruction. as prayed for, it would have been clearly erroneous, because in it was embraced the assertion that McLean stated to the insurance company "that he did not have a habit of drinking liquors," whereas the evidence shows without contradiction that he stated to the company that he did drink liquors, and that he did drink them moderately, from which it necessarily followed that he informed the company that he had a habit of drinking liquors "moderately."

2. Should the court find that the instruction denied was a proper expression of the law, it will also find that plaintiff in error was not injured by the refusal of the court below to give such instruction, because the court did give instructions 12, 13, 14, 15, 18, 19 and 20, set forth in the 6th exception, which stated the law as strongly in favor of plaintiff in error as could have been reasonably desired.

Assignment of Error No. 15.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 16, as set forth in the 7th exception of the bill of exceptions, to-wit: "16. The plaintiff has not proved his replication, to-wit, 'that the defendant informed McLean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner; and

informed him that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said McLean, and that the said McLean understood, and had reason to understand, that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing McLean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts."

1. This instruction ought not to have been given and was correctly refused, because, the jury having before it the application for insurance and the declaration to the medical examiner, had a right to infer, and the court was willing for them to infer, that when the company consented to deliver the policy to the deceased, notwithstanding his failure to answer one material question propounded to him, and notwithstanding the information conveyed to him in the "note" as to the consequence that would result from his not answering fully and definitely, the policy would be issued upon information acquired from other sources, and that he had a reason to so understand, and that so believing he accepted the policy and paid the premiums.

2. Plaintiff in error had the full benefit of all that could be reasonably exacted through the instruction denied, by the giving of instruction 17, set forth in the 7th exception, to-wit: "If you find that the defendant, before it issued the policy sued on, notified the said McLean that the policy would not be issued on the basis of a declaration made by him in reference to the extent of his habitual indulgence in the use of spiritual liquors, then you must find for the plaintiff. The plaintiff, however, must prove such notification, and he must prove it by evidence outside of anything contained in the policy, application, statement to the medical examiner and the medical examiner's report. There is nothing in these papers, singly or taken together, which shows, or tends to show, any such notification."

3. The instruction 16, which was denied, is in legal effect so nearly identical with instruction 17, just recited, and which was given at the request of the plaintiff in error, that the court below was justified in refusing to give the former, even if it embodied correct law.

Assignment of Error No. 18.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 11, as set forth in the 10th exception of the bill of exceptions, to-wit: "11. The court instructs you that in a case where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury. And in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

This instruction embodies a correct proposition of law, applicable to the case before the court.

I May on Ins. Sec. 299, p. 609;
3 Joice on Ins. Sec. 2097;
Moulor vs. Ins. Co. 101 U. S. 708;
Bissler vs. Am. Ins. Co. 51 S. W. Rep. 755;
Fitch vs. Ins. Co. 59 N. Y. 557;
Knickerbocker Life Ins. Co. vs. Foley, 105 U. S. 350;
Mut. Res. L. Assn. vs. Farmer, 47 S. W. 850.

Assignment of Error No. 22.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 18, as set forth in the 14th exception of the bill of exceptions, to-wit: "18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer, that the company waived information on that point."

This also embodies a correct proposition of law.

L. H. Assn. vs. Ins. Co. 7 Gray, (Mass.) 265;
Swick vs. Home Life Ins. Co. 2 Dillon, 165;
Phœnix Life Ins. Co. vs. Raddin, 120 U. S. 183;
Moulor vs. Ins. Co. 101 U. S. 708.

Assignment of Error No. 23.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff,

numbered 28, as set forth in the 15th exception of the bill of exceptions: "28. If you find that the habits of Alexander S. McLean, the assured, in the usual, ordinary and every day routine of his life were temperate then the representations made by him in his application and to the medical examiner were not untrue within the meaning of the conditions upon which the policy sued upon was issued."

By reference to the 15th exception it will be seen that "there was testimony to prove that McLean was, in the usual, ordinary and every day routine of his life temperate in his habits, and there was testimony tending to prove the contrary." Under such conditions the instruction was legal and proper.

Knickerbocker L. Ins. Co. vs. Foley, 105 U. S. 350;
1 May on Ins. Sec. 299, p. 609.

Respectfully submitted,

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